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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON
7

8 UNITED STATES OF AMERICA,

9 Plaintiff,

10 v.

11 JOHN BRANNON SUTTLE III,

12 Defendant.
13

NO. 2:14-cr-00083-SAB

**ORDER GRANTING
DEFENDANT'S MOTION TO
VACATE**

14 Before the Court is Defendant's Motion to Vacate in Light of *Johnson v.*
15 *United States*, 135 S.Ct. 2551 (2015). ECF No. 58. A hearing on the motion was
16 held on June 14, 2016, in Yakima, Washington. Defendant was represented by
17 Alison Guernsey. The United States was represented by Thomas J. Hanlon,
18 substituting for Caitlin A. Baunsgard.

19 **BACKGROUND FACTS**

20 On May 27, 2014, a criminal complaint was filed by the United States
21 charging Defendant with Being a Felon in Possession of a Firearm. ECF No. 1.
22 The accompanying Affidavit set forth Defendant's extensive criminal history,
23 which included 10 felony convictions. An Indictment was filed on June 3, 2014,
24 also charging Defendant with Being a Felon in Possession of a Firearm and
25 Ammunition. ECF No. 16. The penalty slip indicated that the maximum penalty of
26 imprisonment is 10 years, but if Defendant was found to be an Armed Career
27 Criminal, the maximum penalty of imprisonment would be 15 years. ECF No. 17.
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1 On October 7, 2014, Defendant appeared with counsel to enter a change of
2 plea, pursuant to a written plea agreement. Defendant agreed to plead guilty to an
3 Information Superseding Indictment, charging him with Possession of a Stolen
4 Firearm, in violation of 18 U.S.C. § 922(j), 924(a)(2). ECF. No. 34. In taking the
5 plea, the Court engaged in a colloquy with Defendant three separate times in order
6 to better understand the facts to which Defendant was admitting and to ensure that
7 these facts established the elements of the offense, which was Possession of a
8 Stolen Firearm. *Id.*

9 Eventually, the Court accepted Defendant's guilty plea and set a date for
10 sentencing. Page 8, ¶ 14 of the plea agreement contained a waiver of appeal and
11 waiver of Defendant's right to file a § 2255 petition. Notably, while the Court
12 reviewed the waiver of appeal with Defendant during the colloquy, it did not
13 specifically address the waiver of the § 2255 motion. ECF No. 57 at 32.

14 The plea agreement was based on Fed. C. Cr. P.11(c)(1)(C). In it, the parties
15 agreed the Base Offense Level was 24, with a 2-level addition for the gun being
16 stolen, and a 3-level reduction for acceptance of responsibility. The parties agreed
17 the United States would recommend a term of incarceration of 120 months and the
18 Defendant would recommend a term of incarceration of 87 months.

19 U.S. Probation prepared the Presentence Investigation Report. The PSIR set
20 forth a Base Offense Level of 20, because only convictions that receive history
21 points under U.S.S.G. § 4A1.1(a),(b), or (c), and only those convictions that are
22 counted separately can be utilized.¹ Probation included the 2-level increase
23

24 ¹ While Defendant has serious criminal history, including convictions for
25 extortion, burglary, and robbery, these convictions occurred outside the time frame
26 for counting them toward his criminal history. The convictions for which he
27 received criminal history points include Assault and Battery on Emergency
28 Medical Technician (2 counts) (2004); Obtaining Cash or Merchandise by Bogus

1 because Defendant entered a guilty plea with a stipulation that the firearm he
2 possessed was stolen, although Probation noted there was no other indication in
3 the record that the firearm was actually stolen. Probation computed a Total
4 Offense Level of 19, with the corresponding sentencing range at 37 to 46 months.

5 Additionally, in the Specific Offense Characteristics section, Probation
6 noted that originally Defendant was charged with Felon in Possession of a
7 Firearm, and that had he been convicted of that charge, he would have been an
8 Armed Career Criminal facing a mandatory 15-year term of imprisonment. ECF
9 No. 42, ¶ 25. Also, in ¶ 153-154 of the PSIR, Probation addressed the impact of
10 the plea agreement, noting Defendant faced a 15-year sentence as originally
11 charged, and also noted the plea agreement recommended a sentence range (87-
12 120 months) that was significantly higher than the guideline range (37-46
13 months).

14 In its Sentencing Memorandum, the United States reiterated that Defendant
15 received a substantial reduction to his sentencing exposure by pleading to
16 Possession of a Stolen Firearm versus Felon in Possession of a Firearm, and
17 thereby avoiding the Armed Career Criminal 15-year mandatory minimum. ECF
18 No. 49 at 1-2. It also noted that generally, the United States will only agree to a
19 120-month sentence when Defendant receives such relief. *Id.* at 2.

20 The Court imposed a sentence of 87 months imprisonment; three years
21 supervised release; and \$100 special penalty assessment. It imposed the above the
22 advisory guideline range based on the binding plea agreement.

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27 Check (2005); Possession of Controlled Substance/Drug Paraphernalia (2005);
28 and Possession of Controlled Substance (2009).

MOTION STANDARD

Under 28 U.S.C. § 2255, a federal prisoner in custody under sentence may move the court that imposed the sentence to vacate, set aside, or correct the sentence on the ground that:

- (1) the sentence was imposed in violation of the Constitution or laws of the United States;
- (2) the court was without jurisdiction to impose such sentence; or
- (3) the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.

28 U.S.C. § 2255(a).

The harmless error review standard applies to § 2255 motions. *United States v. Montalvo*, 331 F.3d 1052, 1057 (9th Cir. 2003) (holding that *Brecht*'s harmless error standard applies to habeas cases under § 2255). Under *Brecht*, a constitutional error does not require reversal of conviction unless the petitioner can show that the error was of such magnitude as to have a substantial and injurious effect or influence on the guilty plea or the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

A party seeking relief under § 2255 must file his or her motion within the one-year statute of limitations set forth in § 2255(f). For purposes of this case, the limitations period runs one year from when the right asserted is initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.

JOHNSON AND WELCH

Although Defendant was not sentenced under the Armed Career Criminal Act (ACCA), as set forth above it played a significant role in the ultimate resolution of this case. The ACCA requires courts to impose a sentence of not less than 15 years for persons convicted of Felon in Possession of a Firearm (among other convictions), who have three previous convictions for a violent felony or a

1 serious drug offense or both. 18 U.S.C. § 924(e)(1). Section 924(e)(2)(B)² defines
 2 “violent felony” to include a specified crime that “otherwise involves conduct that
 3 presents a serious potential risk of physical injury to another.” This phrase has
 4 been referred to as the “residual clause.” *United States v. Lee*, __ F.3d __, 2016
 5 2638364 (9th Cir. May 6, 2016).

6 In *Johnson v. United States*, the Supreme Court held that the residual clause
 7 of the ACCA was void for vagueness. __ U.S. __, 135 S.Ct. 2551, 2557 (2015).
 8 Recently, the Supreme Court held that its decision in *Johnson* announced a new
 9 substantive rule that applied retroactively on collateral review. *Welch v. United*
 10 *States*, __ U.S. __, 136 S.Ct. 1257, 1265 (2016).

11 WAIVER

12 The Government asks the Court to enforce the waiver of the right to file
 13 a § 2255 motion that is contained in the plea agreement.

14 The Ninth Circuit has held that an appeal waiver will not apply if: 1) a
 15 defendant’s guilty plea failed to comply with Fed. R. Cr.P. 11; 2) the sentencing
 16 judge informs a defendant that he retains the right to appeal; 3) the sentence does
 17 not comport with the terms of the plea agreement; or 4) the sentence violates the
 18 law. *United States v. Bibler*, 495 F.3d 621, 632 (9th Cir. 2007) (collecting cases).

21 ² 18 U.S.C. § 924(e)(2)(B) states:

22 [T]he term “violent felony” means any crime punishable by
 23 imprisonment for a term exceeding one year, or any act of juvenile
 24 delinquency involving the use or carrying of a firearm, knife, or
 25 destructive device that would be punishable by imprisonment for such
 term if committed by an adult, that—

26 (i) has as an element the use, attempted use, or threatened use
 of physical force against the person of another; or

27 (ii) is burglary, arson, or extortion, involves use of explosives,
 28 or otherwise involves conduct that presents a serious potential risk of
 physical injury to another. . .

1 Defendant asserts the waiver is unenforceable pursuant to *United States v.*
2 *Arellano-Gallegos*, 387 F.3d 794, 796-97 (9th Cir. 2004). In *Arellano-Gallegos*,
3 the Circuit held that the failure to comply with Rule 11 constituted plain error. *Id.*
4 at 797 (noting that “wholesale failure” to comply with Rule 11 to ensure that the
5 defendant understood the consequences of his waiver of right to appeal would
6 seriously affect the fairness, integrity, and public reputation of plea proceedings).

7 At the hearing, the United States did not challenge Defendant’s assertions
8 that the Court’s colloquy with Defendant did not comply with Rule 11. A review
9 of the transcript reveals that the Court did not discuss the waiver of Defendant’s
10 right to file a § 2255 petition with him and as such, the waiver is not enforceable.

11 In addition, as set forth below, Defendant’s sentence is unconstitutional
12 because the ACCA affected every aspect of the proceedings beginning with the
13 charging decision to the ultimate sentence pronounced by the Court, and therefore,
14 the waiver is not enforceable.

15 Finally, the Court questions but does not decide whether, in the context of a
16 change of plea hearing, a defendant can ever knowingly and intelligently waive his
17 right to file an appeal or to file a § 2255 motion. The Court agrees with Judge Paul
18 Friedman, when he noted in his dissenting opinion:

19 Sentencing, however, does not occur contemporaneously with the
20 plea and waiver. It is a future event, and the mistakes from which one
21 might have reason to appeal have not yet occurred at the time a
22 defendant waives the right to appeal or collaterally attack the plea or
23 sentencing proceedings. A defendant cannot know what he or she has
24 given up by waiving the right to appeal until after the judge and
25 counsel have reviewed a yet-to-be prepared presentence investigation
26 report, after the judge has considered other information not known to
27 the defendant at the time of the plea and after the judge has actually
28 imposed sentence. By then it is too late, no matter how
disproportionate the sentence or how egregious the procedural or
substantive error committed by the sentencing judge or the
defendant’s own counsel. It is hard to see how a defendant at the plea
hearing can ever knowingly or intelligently—that is, with “a full

1 awareness of both the nature of the rights being abandoned and the
2 consequences of the decision to abandon it”—waive the right to
3 appeal or collaterally attack a sentence that has not yet been imposed.
4 Such perspective waivers in anticipation of unknown further events
are inherently unknowing and unintelligent.

5 *United States v. Medina-Carrasco*, 815 F.3d 457, 464 (9th Cir. 2016) (J.
Friedman, dissenting).

6 ANALYSIS

7 Defendant maintains that post-*Johnson* many, if not all, of Defendant’s prior
8 predicate convictions are no longer “violent felonies” and would not subject him
9 to ACCA exposure, which induced his agreement to request such an above-range
10 sentence. He maintains that if he were sentenced today, he would be subject to a
11 Base Offense Level of 14, resulting in a guideline range of 18 to 24 months.³

12 As set forth above, the underlying foundation upon which the resolution of
13 Defendant’s case was based has now crumbled in the wake of *Johnson* and *Welch*.
14 The initial charging document, the plea negotiations, the resulting 11(c)(1)(C) plea
15 agreement, the decision to forgo a pretrial motion to suppress and to plead guilty,
16 the sentencing recommendations by both parties, and the sentencing decision were
17 all made or taken in light of the fact that Defendant was facing an ACCA 15-year
18 mandatory minimum sentence.

19 Because of this, the proper analysis is not as the parties have framed it, that
20 is, whether the new rule announced in *Johnson* is a new substantive or procedural
21 rule and whether it is applicable to the Guidelines. Rather, the proper analysis is to
22 view Defendant’s case as a *Johnson* case. While not every case in which a
23 defendant is facing potential ACCA exposure should be viewed in this manner,
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25 ³The United States did not challenge this assertion in its briefing, but stated at oral
26 argument it believed that to the extent the case was going to come back for
27 resentencing, the issue of whether Defendant’s prior offense would count as
28 crimes of violence would be resolved during the resentencing process.

1 given the circumstances of this case, especially in light of the questions the Court
2 and Probation had regarding the elements of the crime, *i.e.* whether the gun was
3 stolen, the fact that Defendant agreed to a sentence that was almost double the
4 Guideline range, and the fact that had Defendant been sentenced as originally
5 charged he would have been eligible for § 2255 relief, due process, the interest of
6 justice, and fundamental fairness demand that the Court consider Defendant's
7 § 2255 motion as if he was pursuing *Johnson* ACCA claims.

8 When viewed in this light, the retroactive application of the *Johnson* rule to
9 the criminal proceedings in the above-captioned case establishes that it was
10 constitutional error to proceed as if Defendant met the ACCA requirements.
11 Defendant has established that this error was not harmless. As such, resentencing
12 is required.

13 In addition, in the case at bar, the Government concedes that *Johnson's*
14 invalidation of the ACCA residual clause likewise invalidates the identically
15 worded residual clause guideline, with the effect that USSG 4B1.2(a)(2) can no
16 longer be applied in sentencing proceedings and in cases pending on direct review
17 as of the date *Johnson* was decided. However, the Government objects to the
18 pending motion to vacate and argues that the *Johnson* rule is procedural, not
19 substantive, and therefore not retroactive to a collateral challenge to the guidelines
20 under the *Teague v. Lane*, 489 U.S. 288, 310 (1989).

21 This same stipulation and similar arguments were made by the Government
22 in *United States v. Dean*, 2016 WL 1060229 (D. Oregon Mar. 2016). In *Dean*, the
23 district court considered very similar arguments made here and concluded that
24 *Johnson* applies retroactively because it is a new substantive rule and thus the
25 *Teague* bar does not apply. While the *Dean* case is not controlling on this Court, it
26 is persuasive.

27 Similarly, in this case, the *Johnson* rule is a new substantive rule and thus
28 the *Teague* bar does not apply.

Accordingly, **IT IS HEREBY ORDERED:**

1. Defendant's Motion to Vacate in Light of *Johnson v. United States*, 135 S.Ct. 2551 (2015), ECF No. 58, is **GRANTED**.

2. Counsel for the United States is directed to work closely with the U.S. Marshals Service to make Defendant available for a resentencing hearing forthwith, and shall notify the Court as soon as it can determine when Defendant will be available for the resentencing hearing.

3. Defendant's Motion for Permission to File Overlength Brief, ECF No. 71, is **GRANTED**.

4. Defendant's Motion to Expedite, ECF No. 72, is **GRANTED**.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this Order and provide a copy to counsel and the U.S. Marshals Service.

DATED this 20th day of June, 2016.



A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

Stanley A. Bastian
United States District Judge